

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair
Commissioner
Commissioner
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In the Matter of the Application of Otter Tail
Power Company and Others for Certification of
Transmission Facilities in Western Minnesota

ISSUE DATE: November 29, 2005

DOCKET NO. ET-6131, ET-2, ET-6130,
ET-10, ET-6444, E-017, ET-9/CN-05-619

ORDER AGREEING TO COMBINING THE
ENVIRONMENTAL REPORT AND THE
ENVIRONMENTAL IMPACT STATEMENT
DOCUMENTS

PROCEDURAL HISTORY

On October 3, 2005, Otter Tail Power Company (OTP or the Company) and six other utilities (collectively, the Applicants) filed a certificate of need application for a proposed transmission project in western Minnesota. According to the Applicants, the proposed facilities are needed to provide transmission outlet capacity for a new coal-fired unit at the Big Stone Power Plant in South Dakota and to strengthen the regional power grid.

On October 5, 2005, the Commission issued a Notice inviting comments on the completeness of the Applicants' filing and certain procedural issues.

On October 21, 2005, the Department of Commerce (the Department) addressed the environmental review and joint hearings issues in its Completeness Review. The Minnesota Center for Environmental Advocacy and several other organizations (collectively, the Organizations) also filed comments regarding procedural issues.

The Commission met on November 10, 2005 to consider procedural questions regarding this docket, i.e., whether it should authorize the Department to combine the environmental report and environmental impact statement processes, as allowed by Minn. Rules, Part 4410.7060, subp. 2 .

FINDINGS AND CONCLUSIONS

I. Summary of Order

In this Order, the Commission agrees that the Department may combine the environmental report (required as part of the certificate of need process) and the environmental impact statement (part of

the siting and routing process) in one document, pursuant to Minn. Rules. Part 4410.7060, subp. 2. The Commission also supports holding a joint public hearing to receive comments from the public on both need and routing. The Commission defers to the prehearing conference, however, which will be scheduled after the routing application has been filed, consideration of whether and how to conduct joint evidentiary hearings for the two processes.

II. Background

The Applicants' proposed facility, a "large energy facility" as defined in Minn. Stat. § 216B.2421, subd. 2 (2), requires a certificate of need from the Commission prior to construction. An environmental review conducted by the Department must be considered as part of the certificate of need process.¹

If the facility is certified for need, the Commission also will have to determine specific routes for the transmission facilities.

Minn. Rules, Part 4410.7060, subp. 2 allows the Department to include analysis of certificate of need alternatives in the environmental impact statement (EIS) prepared for the routing process, if the Commission and the Applicants agree to the additional time that such a combination might require.

III. The Applicants' Proposal

The Applicants proposed combining the environmental review components of the certificate of need process and the routing process. They argued that this would be consistent with the applicable rules, avoid duplication, and perhaps avoid confusion on the part of the public. Consistent with this approach, the Department would postpone conducting a meeting to discuss the scope of the environmental review until the routing application was submitted. The Applicants also recommended that a joint public hearing be held, both to receive comments from the public and to receive evidentiary testimony from witnesses for the formal parties. The Applicants provided a flow chart showing the steps of the joint processes, as well as suggested times for those steps.

IV. Comments of the Parties

A. The Department

The Department stated that a joint hearing is now the statutory default and agreed with the Applicants' proposed framework for a joint hearing process (for need and routing). The Department also recommended that one environmental document be prepared in this proceeding. In support of this position, the Department noted that 1) the need application already contains much of the information that would be in the environmental report; 2) no party would be prejudiced by the one-document procedure; and 3) Minnesota Rules allow for the preparation of an environmental impact statement (EIS) in lieu of the environmental report.

¹ See Minn. Rules, Part 4410.7010 to 4410.7070.

B. Comments of the Organizations

The Organizations stated that they are open to the ideas of having a joint environmental document prepared and holding a joint hearing to receive comments from the public. The Organizations opposed combining the need and routing processes completely, however, arguing that the joint public hearing referenced in Minn. Stat. § 216B.243, subd. 4 is for receiving input from members of the public, not for the evidentiary contested case hearings.

They also cautioned that the route investigation would be moot if the Applicants fail to meet their burden on the threshold issue of whether to build. In addition, they stated, the need question is complicated by the concurrent resource planning proceedings for some of the Applicants (i.e., Otter Tail Power Company, Great River Energy, and Missouri River Energy Services). The Organizations emphasized that if need issues are considered in a combined environmental document, the scope or level of analysis required for a need determination must not be compromised.

V. Commission Analysis and Action

A. Background

Authority to construct a large energy facility in Minnesota requires the procurement of two items: a certificate of need and a site or route permit. While siting and routing permits have until recently been issued by the Environmental Quality Board (EQB), both items (need and siting/routing) are currently within the Commission's jurisdiction.² The Legislature and Commission rules encourage but do not mandate combining aspects of these two processes.

There are three areas where merged activity could occur: 1) environmental reviews, which are essential elements of each process; 2) public hearings at which public comments on the need and siting, respectively, are taken; and 3) evidentiary hearings on contested issues pertinent to the merits of each process.

B. Environmental Review: Unified Document

With respect to combining aspects of the environmental reviews, the Department has advocated preparing one environmental document for both processes, i.e., an environmental impact statement (EIS) in lieu of an environmental report. The two documents (the EIS and the environmental report) are similar but distinct. For example, the EIS part of the siting/routing process while the

² Prior to recently enacted energy legislation, the Commission had the responsibility and authority to issue certificates of need and the Environmental Quality Board (EQB) had the responsibility and authority to issue site or route permits. In 2005, the Minnesota Legislature transferred the EQB's siting and routing authority to the Commission and encouraged a certain level of combining of the two processes. See S.F. 1368 - 84th Legislative Session, Article 3, Section 17 and Minn. Stat. § 216B.243, subd. 4.

environmental report is part of the certificate of need process and contains items specified in Minn. Rules, Part 4410.7035.

Under Minn. Rules, Part 4410.7060 , subp. 2, the Commission has discretion to agree to the Department combining these two documents. The Commission will agree to the combination in this case because the additional time required to prepare the EIS will prejudice no party and combining the two documents will be more efficient overall.

The Commission notes that the rule's other prerequisites for allowing the Department to elect to prepare an EIS in lieu of an environmental report are also fulfilled in this case. First, the Applicants, who have already applied for a certificate of need, will apply for a route permit before the Department would have completed the environmental report.³ Second, the project does not qualify for alternative review pursuant to Minn. Rules, Part 4400.2000 because it meets none of the seven categories delineated in that rule.

The Commission further notes that if the Department proceeds pursuant to Minn. Rules, Part 4410.7060, subp. 2 to produce an EIS in lieu of an environmental report , the Company is required by that rule to include in the EIS the analysis of alternatives required by Minn. Rules, Part 4410.7035, subp. 1, B and C.

C. Joint Public Hearings

The Minnesota State Legislature recently amended Minn. Stat. § 216B.243, subd. 4 to require joint hearings for certificates of need and for a site or route permit unless the Commission determines that a joint hearing on siting and need is not feasible or more efficient or otherwise not in the public interest.

In this case, the Commission can make no such determinations. On the contrary, the Commission finds that public hearings to receive public comment regarding need and routing are feasible, more efficient, and in the public interest. Accordingly, the Commission believes that the public hearings to hear receive public comment regarding need and routing should be combined. It will be a service to the public to allow them to comment on both aspects of the matter at the same hearing rather than requiring attendance at two separate hearings to do so.

Notices regarding the public hearings can clarify the dual subjects available for comment at the hearing (need and routing) and at the hearings themselves, the convening Administrative Law Judge⁴ or regulatory staff in attendance can clarify that two distinct issues are to be addressed at the hearing: need and routing.

³ It is anticipated that the Applicants' routing application will be submitted on or about December 1, 2005.

⁴ Based on previous matters of this nature, it is probable that when the Commission conducts its completeness review of the Applicants' filing (currently projected for the first part of December, 2005) it will refer the matter to the Office of Administrative Hearings for a contested case proceeding before an Administrative Law Judge.

D. Joint Evidentiary Hearings

At the hearing, the parties agreed that it was not necessary to decide at this time whether and how to conduct joint evidentiary hearings on the two topics, need and routing. They jointly recommended that these questions be addressed at a later date, at a prehearing conference.

The Commission finds that postponing a decision on this issue is appropriate. To properly decide the issue, both the certificate of need application and the routing request will need to be examined. Consideration of any merger of evidentiary hearings would be premature at this point since the routing application has not been submitted.

Deferring the question of joint evidentiary hearings to the prehearing conference makes sense, assuming as is likely that when the Commission conducts its completeness review of the Applicants' filing it will indeed refer the matter to the Office of Administrative Hearings for a contested case proceeding before an Administrative Law Judge. By then the routing application will have been submitted. In any event, the routing application should be available for consideration along with the certificate of need application when joint evidentiary hearings are considered.

ORDER

1. The Commission hereby agrees that the Department of Commerce may prepare one environmental document for both the certificate of need and routing processes, i.e., the Department may submit an environmental impact statement (EIS) in lieu of an environmental report.
2. The public hearings on need and routing issues shall be combined in this proceeding.
3. The Commission defers consideration of whether and how to conduct joint evidentiary hearings on need and routing.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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